No. 80922-4

(COA No. 34630-3-II)

SUPREME COURT
OF THE STATE OF WASHINGTON

JESSE MAGANA,

Petitioner,

vs.

HYUNDAI MOTOR AMERICA; HYUNDAI MOTOR COMPANY,

Respondents,

and

RICKY and ANGELA SMITH, husband and wife; et al.,

Defendants.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases **Page**

Other Cases

Constitutional Provisions, Statutes and Court Rules

Other Authorities

I. SUMMARY INTRODUCTION

This case gives this Court the opportunity to clarify the test that must be met before a Washington trial court dismisses a plaintiff's complaint, or strikes a defendant's answer and enters a default judgment, as a sanction for discovery violations.

It has long been the rule that the taking of a judgment by default for a failure to provide discovery, "solely as a punishment...and without any regard to the substance...or the nature of the discovery sought," deprives a defendant of due process of law. *See, e.g., Lawson v. Black Diamond Coal Mining Co.*, 44 Wash. 26, 32, 86 P. 1120 (1906) (citing in part *Hovey v. Elliot*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897)) (reversing default judgment). Moreover, the rule has been held to apply even where the failure was willful. *See, e.g., Mitchell v. Watson*, 58 Wn.2d 206, 209-217, 361 P. 2d 744 (1961) (citing both *Lawson* and *Hovey*) (reversing default judgment).

Nothing in this Court's recent discovery jurisprudence suggests this Court has in any way retreated from these principles. In *Washington State Physicians Insurance Exchange & Association v. Fisons*, 122 Wn.2d 299, 858 P.2d 1054 (1993), this Court took care to caution that the new discovery standards announced in that case would still be subject to the requirement that the "least severe sanction" adequate to the purpose should be imposed. *See Fisons*, 122 Wn.2d at 355-56. In *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), this Court rejected the highly deferential "case management" approach to appellate

review of discovery sanctions, and mandated that a trial court must state on the record its reasons for choosing as "severe" a sanction as the striking of essential proof for a claim or defense. *See Burnet*, 131 Wn.2d at 497-98. And while this Court held most recently in *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.2d 115 (2006), that such "on the record" balancing is not required when the sanction is purely monetary, this Court took care to draw a bright line between such sanctions and those that "affect a party's ability to present its case," making clear that the latter continue to implicate due process. *See Mayer*, 156 Wn.2d at 689-90.

This case involves the *ultimate* sanction that "affect[s] a party's ability to present its case" -- ruling that the opposing party shall *win*, and *without* a finding in favor of that party on the actual merits of their claim or defense. In ruling that Petitioner Jesse Magana should win without a finding in his favor on the merits of his products liability claim, the trial court found that late production by Hyundai of (so-called) "other similar incidents" discovery material had deprived Magana of evidence that went to the heart of his case. Yet Magana had already won a trial without that evidence. Moreover, the testimony of Magana's own experts established that the value of this material to Magana's case was not *and could not be* known without further proceedings to determine whether any of the material was actually relevant and admissible. The record also conclusively established that the process for determining actual relevance and admissibility would have taken only a few months, *and* that any prejudice to Magana caused by the late production of the material could have been

fully cured by a sanction less severe than a default.

The Court of Appeals therefore correctly concluded that the trial court abused its discretion when it imposed the ultimate sanction of a default judgment, because the record did not establish that Magana had suffered the kind of prejudice that due process requires before such a sanction may be imposed. *See, e.g., Burnet,* 131 Wn.2d at 497 (courts should impose only those sanctions that advance the purposes of discovery while compensating the complaining party for the effects of the opposing party's discovery failings). This Court should affirm the Court of Appeals' reversal of the trial court's default judgment, and in doing so make clear that unless the party complaining of discovery abuse *also* clearly establishes that the abuse has irremediably deprived that party of a fair trial on their claims or defenses, due process forbids imposing the ultimate sanction of dismissing a plaintiff's complaint or striking a defendant's answer and entering a default judgment. Any less demanding a standard conflicts with the mandates of due process and substantially deviates from this Court's longstanding precedents. It also would impermissibly dilute Washington's historic commitment to maintaining inviolate the right to jury trial in civil damage actions.

II. SUPPLEMENTAL STATEMENT OF THE CASE

In 1997, Petitioner Jesse Magana was seriously injured in a single car accident of extraordinary violence involving a 1996 Hyundai "Accent." Three years later Magana sued Hyundai and, as part of a wide-ranging set of initial discovery requests, asked Hyundai to produce

information concerning so-called "other similar incidents" ("OSIs") involving seatback failure, for every Hyundai model and for every model year from 1980 to the date of Magana's request. *See* CP 3728 (Request for Production No. 20). Responding to this request in April of 2000, Hyundai objected to its scope while also stating that Hyundai had no seatback claims or lawsuits for the Accent for model years 1995 through 1999. CP 3750 (Response). Hyundai did not check its 1-800 consumer telephone "hotline" records before giving this response. CP 5319 (FOF No. 22). At that time, those records documented two telephone complaints about the performance in rear impact collisions of seatbacks in Accents for those model years.[1]

Hyundai produced thousands of pages of documents and dozens of product test reports in response to Magana's overall discovery requests. *See* (CP 3924-25 (letter from Hyundai's counsel describing planned scope of production); CP 3301-02 (Vanderford Decl. at 4-5, ¶¶ B.1-B.3, describing production of test reports and videotapes); *see also* CP 3927 (letter from Magana's counsel acknowledging Hyundai's "good initial

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[1] *See* Exs. 31 ("Martinez," involving a 1995 Accent) & 32 ("McQuarry," involving a 1997 Accent). The trial court found these were "claims" and that Hyundai's "no claims or lawsuits" response therefore was misleading, and the Court of Appeals affirmed this determination. *See Magana v. Hyundai Motor America*, 141 Wn. App. 495, 513, ¶¶ 35-36, 170 P.3d 1165 (2007) (*Magana II*). Hyundai responded to a separate discovery request about models with substantially similar front right seats as the Accent by stating no other models had substantially similar seatbacks. *See* CP 3741 (Response to Interrogatory No. 12). The trial court later concluded that the front right seats of the "Elantra" were substantially similar, and the Court of Appeals affirmed this determination. *See Magana II*, 141 Wn. App. at 514, ¶¶ 38-39. The earliest Elantra seatback report ("Urice") was received by Hyundai after it responded to RFP No. 20. *See* Ex. 34 (reflecting intake date of 5/02/00).

production"). The parties also reached agreements on several document production matters. *See* CP 3939-40 (letter from counsel). Magana objected to the scope of Hyundai's response to Magana's OSI discovery requests, but after reaching an agreement on the production of *airbag* OSIs, Magana did not pursue discovery of seatback OSIs and ultimately did not introduce any OSI evidence during the Summer 2002 trial.[2]

Magana represented during discovery that his "occupant kinematics" expert, Dr. Joseph Burton, would not offer opinions about design issues. *See* CP 3957-59 (Magana's supplemental response to Hyundai's expert witness interrogatory); CP 3962-68 (Burton's expert witness report); CP 3353 (Burton Dep. transcript at pp. 16-17) (stating he had "not been asked to do any design analysis"). During his testimony at the Summer 2002 trial, however, Burton claimed that an alternative seatbelt design would have prevented Magana's injuries. *See* CP 3434-35 (June 2002 trial VRP 977-78); *Magana v. Hyundai Motor America*, 123 Wn. App. 306, 312, 94 P.3d 987 (2004) (*Magana I*) (quoting testimony). Hyundai objected because the testimony violated the scope of Burton's opinions disclosed during discovery; the trial court initially overruled the objection but later reconsidered and struck the testimony. *See* CP 3434-35 (June 2002 VRP 997-98) (objection); CP 3440-41 (June 2002 trial VRP

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[2] *See* CP 3939 (letter from Hyundai's counsel, describing scope of agreed production of airbag OSIs); CP 3946 (cover letter transmitting airbag OSI documents). Magana later denied that the parties had reached an agreement expressly relieving Hyundai of any obligation to produce seatback OSIs, the trial court found there was no such agreement, and the Court of Appeals affirmed this determination. *See Magana II*, 141 Wn. App. at 511-512, ¶¶ 32-34.

992-93) (motion to strike); CP 3447-49 (June 2002 VRP 1666-1668) (reconsideration).

Magana did not challenge the trial court's decision to reconsider and strike, but did manage -- over Hyundai's exception -- to persuade the trial court not to tell the jury that the evidence had been stricken. CP 3453-55 (June 2002 trial VRP 2275-2277) (colloquy). The jury ruled in Magana's favor on liability and awarded just over $8,000,000 in damages. *See* CP 694-96 (verdict form). Hyundai appealed and raised several issues, including the trial court's failure to instruct the jury about its striking of Dr. Burton's improper alternative design testimony; the Court of Appeals held that the failure to instruct the jury that the testimony had been stricken was prejudicial error and remanded for a new trial. *See Magana I*, 123 Wn. App. at 316-319. Magana did not petition for review.[3]

Shortly after the mandate issued in the Spring of 2005, the trial court set a retrial commencement date of January 17, 2006. CP 4024 (retrial setting). That September, with the retrial four months away, Magana sought to reopen seatback OSI discovery; after the parties could not reach agreement on the scope of Hyundai's supplementation, Magana moved to compel production to the full extent of his original seatback OSI

[3] Magana made no attempt in briefing or at oral argument to defend the trial court's initial decision to admit the Burton design evidence. *See Magana I*, 123 Wn. App. at 315, n.6. In a motion for reconsideration, Magana -- for the first time before either the trial or appellate court -- claimed that Hyundai had misled the trial court about the permissible scope of Dr. Burton's testimony. *See* CP 3564 (Motion for Reconsideration at 14). The Court of Appeals denied reconsideration on this ground, while granting reconsideration on the scope of retrial and ordering that it should be limited to liability. *See* CP 3592 (order amending opinion).

discovery requests (covering all Hyundai models and going back 25 years to 1980). *See* CP 4032-33 & 4050-51 (letters from counsel); CP 787-830 (Magana's motion to compel). The trial court granted Magana's motion in November and Hyundai fully complied with the order, producing documents pertaining to several lawsuits[4] as well as consumer hotline records.[5]

On the eve of the scheduled retrial Magana moved for a default, even though his own experts admitted they were not in a position to determine the admissibility or ultimate relevance of *any* of the OSIs.[6] Magana also opposed a continuance, even though he now admits that the

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[4] Hyundai initially omitted records for the "*Acevedo*" case, involving a Hyundai model other than an Accent and which had been classified both by Hyundai and by plaintiff's counsel in that case as a seat*belt* case. *See* CP 3303-05 (Decl. of Vanderford at pp. 6-8, ¶¶ D.1-D.5); CP 3415 (webpage of *Acevedo* plaintiff's law firm, listing case "type" as "Seat-Belt"). The fact of an additional seat*back* issue was brought to Hyundai's attention, and Hyundai produced the records pertaining to the case. *See* CP 6007 (Certification of Compliance with trial court's order, including production of *Acevedo* documents).

[5] To fully comply with its consumer hotline production obligations, Hyundai had its technology department rebuild computer records that had been taken offline. CP 1028-30 (Dowd Decl. at 1-3, ¶¶ 2-8); CP 1721-22 (Supp Dowd Decl.).

[6] *See* CP 2665-66 (Decl. of Magana's design defect expert Mr. Stephen Syson, at pp. 3-4, ¶¶ 11-12 & 14); CP 2669-2770 (Decl. of Dr. Burton, at pp. 3-4, ¶¶ 10-11 & 14). These admissions were compelled by the well-established law regarding so-called "other similar incidents," which holds that such material is not presumptively admissible and must be proven to involve *actually* substantially similar accidents before being admitted into evidence. *See, e.g., Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 142 (Tex. 2004) (reversing and remanding for a new trial after trial court failed to properly screen OSIs before admitting them) ("product defects must be proved; they cannot simply be inferred from a large number of complaints"). In fact, a review of all of the Accent OSIs produced by Hyundai showed they likely would be determined not to be substantially similar and therefore inadmissible. *See* CP 5577-78 (Blaisdell Decl. at pp. 6-7, ¶¶ 17-19 (discussing Exs. 9, 30, 31, 32, 36, 37-40)). Moreover (and as the Court of Appeals recognized), the OSIs could at most confirm a fact not in dispute: that seatbacks yield during rear impact collisions. *See Magana II*, 141 Wn. App. at 518, n.20.

process of reviewing the OSIs to determine their admissibility would have taken only a few months. *See* Petition for Review at 18 (citing testimony of Mr. David Swartling, VRP (Jan. 18, 2006) 20-24 & 83-84). Magana asserted that delay in producing the records had rendered some of them "stale," but Magana could not offer a single example of where this passage of time had actually made it impossible to determine admissibility.[7]

The trial court nonetheless defaulted Hyundai, finding Magana had been deprived of evidence that went to the heart of his case. *See* CP 5332-33 (FOF Nos. 65 & 69). The Court of Appeals reversed, holding the trial court abused its discretion because its finding of such a deprivation was not supported by substantial evidence. *See Magana II*, 141 Wn. App. at 519-20, ¶¶ 48-50.[8]

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[7] Magana called Ms. Nikki Holcomb, who testified that she had misplaced a seatback she had initially retained after her accident. *See* VRP (Jan. 17, 2006) 98:3-111:16 (Holcomb); *see also* Ex. 27 (Holcomb report). But her answers to questions about the accident itself were sufficient to establish that it was not substantially similar to Magana's, rendering her loss of the seatback of no consequence. *See* CP 5576-77 (Blaidell Decl. at pp. 5-6, ¶¶ 12-16). Magana testified to his own efforts to contact persons listed on some of the OSI records but could not identify the loss of any evidence actually essential to establish substantial similarity, and Hyundai showed these limited investigative efforts were legally insufficient to support a conclusion of loss of key evidence due to the passage of time. *Compare* VRP (Jan. 17, 2006) 90:2-94:14 (Magana's testimony); Ex. 1 (list of Magana's phone calls) *with* CP 5495-96 (Bennett Decl.); CP 5761-62 (Runyan Decl.).

[8] The Court of Appeals did not reverse the trial court's monetary sanction awards and Hyundai has paid them. *See* Letter to Clerk of the Court (May 13, 2008) (on file).

III. ARGUMENT

A. This Court Should Reaffirm Washington's Continued Adherence to the Traditional Due Process Rule: A Trial Court May Not Impose the Ultimate Discovery Sanction of Dismissing a Plaintiff's Complaint or Striking a Defendant's Answer Unless Discovery Violations Have Irremediably Deprived the Opposing Party of a Fair Trial on Their Defenses or Claims. This Result Is Consistent With This Court's Long-Standing Commitments to Resolving Disputes on Their Merits, And to Preserving Inviolate the Right to Trial By Jury in Civil Damage Actions.

Over a century ago the United States Supreme Court held that due process bars a trial court from defaulting a defendant in a civil damages action, where the default is imposed solely to punish that party for a contempt of court. *See Hovey v. Elliott* (*supra*), 167 U.S. at 413-14. A few years later the Court ruled that due process allows a default judgment to be imposed as a sanction for discovery violations only because a refusal to provide requested documents or other evidence supports an inference that the withheld matters support the opposing party's claim or defense. *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351, 29 S.Ct. 370, 53 L.Ed 530 (1909). These principles have been expressly embraced by this Court. *See, e.g., Lawson v. Black Diamond Coal Mining Co.* (*supra*), 44 Wash. at 32 (reversing default judgment) ("the striking of [an]...answer and the taking of judgment by default, for failure to answer interrogatories, solely as a punishment for contempt, and without any regard to the substance of the interrogatories, or the nature of the discovery sought" held to violate due process); *Mitchell v. Watson* (*supra*), 58 Wn.2d at 215-216 (reversing default judgment) ("The

principles announced [by the United States Supreme Court] in the *Hovey* and *Hammond* cases ... constitute the walls of the corridor in which Rule 37 must operate").

In recent years, the growing volume of civil litigation has prompted some appellate courts to compromise their commitment to protecting the due process rights of individual litigants, in order to promote "efficient" dispute resolution for civil litigants generally by encouraging trial courts to employ so-called "case management" techniques. Thus, after the United States Supreme Court issued its *per curiam* decision in *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976), some courts seized on the Court's reference to "deter[ring] those who might be tempted to such conduct in the absence of such a deterrent" (427 U.S. at 643) as authorizing trial courts to impose the ultimate sanction of dismissal or default, even though the party complaining about discovery abuse in the case at hand could still have had a fair trial on their claims or defenses.[9]

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[9] The facts found by the District Court in *National Hockey League* constituted a classic case for applying *Hammond Packing*'s due process presumption of prejudice. *See* 427 U.S. at 640-41. Some appellate courts nonetheless read *National Hockey League* as licensing the imposition of the ultimate discovery sanction of dismissal or default so long as that sanction was based on a finding of willful ("bad faith") noncompliance and could be seen as vindicating the goal of deterring similar misconduct by other parties. *See, e.g., Owen v. F.A. Buttrey Co.*, 192 Mont. 274, 627 P.2d 1233, 1235-6 (1981) (declaring *National Hockey League* a "hallmark of judicial activism" and a "major change of direction" in sanctions jurisprudence, and approving its "dispositive teaching" that deterrence should be a "perhaps mandatory...objective" of Rule 37). Other courts, however, have (correctly) recognized that *National Hockey League* should not be read as intending to abrogate the traditional due process constraints on discovery sanctions laid down by *Hovey* and *Hammond Packing*. *See, e.g., Transamerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918, n.7 (Tex. 1991) (reversing sanction of dismissal) ("[t]he *(footnote continued on next page)*

Judge Bridgewater's dissent in this case exemplifies this approach to appellate review of discovery sanctions, under which a trial court is given great latitude to weigh a variety of factors and to impose the ultimate sanction of dismissal or default even if the complaining party could still get a fair trial on the merits of their claims or defenses. *See Magana II*, 141 Wn. App. at 535 & 541, ¶¶ 85 & 98 (Bridgewater, J., dissenting) (citing and quoting in part from *National Hockey League*).[10]

This Court has never wavered from its commitment to traditional due process protections by in any way suggesting that some sort of "collective judicial good" can justify depriving an individual litigant of due process rights. This Court has continued to insist that due process constitutes "the walls of the corridor" (*Mitchell v. Watson,* 58 Wn.2d at 216) within which the discovery process must continue to be supervised.[11]

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conduct sanctioned in *National Hockey League* was so egregious that it clearly would have justified the ultimate sanction under *Hammond Packing*. The *Hammond Packing* rule *is not in doubt*" (emphasis added)). Moreover, since its decision in *National Hockey League*, the United States Supreme Court has referred approvingly to *Hammond Packing* as having "established...the due process limits" applicable to the imposition of discovery sanctions under rules such as Federal Rule of Civil Procedure 37 (the analog to CR 37). *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).

[10] Judge Bridgewater's dissent left no doubt about his willingness to affirm a dismissal or default sanction, regardless of whether the complaining party had proven a fair trial was no longer possible: "It may very well be that timely and complete answers to Magana's interrogatories and requests for production would have made no difference. And it may very well be that effective investigation would have made no difference. *But that is not for us to decide.*" *See Magana II*, 141 Wn. App. at 532-33, ¶ 81 (emphasis added; footnote and citation omitted).

[11] Thus, in *Burnet* this Court expressly rejected an open-ended, deferential "case management" approach to appellate review of discovery sanctions, instead reaffirming due process as the controlling touchstone for the imposition and appellate review of sanctions involving the striking of evidence essential to establishing a claim or defense. *See Burnet*, 131 Wn.2d at 497-98 (opinion for the Court by Alexander, J.) ("The dissent

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Hyundai urges this Court to take this opportunity to reaffirm Washington's adherence to that requirement. Such a result would be consistent with this Court's long-standing preference for resolving disputes on their merits. *See, e.g., Griggs v. Auerbeck Realty*, 92 Wn. 2d 576, 581, 599 P.2d 1289 (1979) (reinstating vacation of default judgment) ("[i]t is the policy of the law that controversies be determined on the merits rather than by default" (citing and quoting *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960)). Discovery, after all, is not an end in and of itself, but the means by which parties get at the evidence by which the trier of fact will determine the truth of the controversy. *See, e.g.,* CP 2652 (Decl. of Justice Robert Utter (ret.) at 2, ¶ 3). Precisely because the ultimate sanction of dismissal[12] or default frustrates that truth seeking process, it should only

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concludes that the sanction imposed by the trial court was appropriate, preferring to interpret the civil rules for superior court in a way that facilitates what it describes as the 'case management powers of the trial courts.' Dissenting op. at 510. While we are not unmindful of the need for efficiency in the administration of justice, *our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action. See* CR 1" (emphasis added)). Rather remarkably, Judge Bridgewater chose to expressly ground his dissent on the case management philosophy of the *dissent* in *Burnet*. *See Magana II*, 141 Wn. App. at 541-42, ¶¶ 97 & 99 (citing and quoting with approval the *Burnet* dissent's urging that this Court "support firm case management by Washington's trial judges"). Judge Bridgewater's candor in relying on the *Burnet* dissent underscores that this Court would have to actively repudiate its decision in *Burnet*, as well as its earlier decisions in *Lawson* and *Mitchell*, in order to adopt an approach to appellate review of trial court decisions under which the default entered against Hyundai could be upheld as a proper exercise of trial court discretion.

[12] Whatever rule this Court adopts, it will apply to dismissal sanctions against plaintiffs as well as default judgments against defendants. Courts in other jurisdictions have sometimes upheld dismissal sanctions even when the record did not demonstrate that the defendant could no longer have a fair trial but the conduct was considered sufficiently egregious to justify the result. *See, e.g., Martin v. DaimlerChrysler Corp.*, 251 F.3d 691, 694-95 (8th Cir. 2001) (dismissal affirmed where plaintiff lied in his deposition about prior lawsuits and prior treatment for emotional distress; although the opportunity to be

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be imposed if one party's discovery wrongdoing has *itself* frustrated that process to the point that a fair trial on the opposing party's claims or defenses can no longer be had.[13]

Reaffirming such a limitation, moreover, is required to preserve inviolate the constitutional right to trial by jury in civil damage actions. In *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711, *as amended*, 780 P. 260 (1989), this Court struck down a legislatively imposed "cap" on general damages because it impermissibly interfered with the jury's fact-finding prerogatives. *See* 112 Wn.2d at 650-656. Reinstatement of the default in this case would empower trial courts to deprive parties of their right to a jury trial, even though the prejudice caused by the discovery violations at issue can be fully remedied and a fair trial on the parties' claims and defenses can still be had. Such a result cannot be reconciled with the constitutional mandate to keep that right "inviolate." Wash. Const., art. 1, § 21.

Finally, a reaffirmation of traditional due process protections

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heard in court is "a litigant's most precious right and should be sparingly denied" the sanction would be upheld given the district court "provide[ed] a specific reasoned explanation for rejecting lesser sanctions").

[13] To do otherwise also risks inverting the relationship between discovery and the merits, as counsel will increasingly see the aggressive use of discovery sanctions as a way to "win" without their client's claims or defenses having to undergo the ultimate test of a trial. *See, e.g.*, "Effective Use of Demonstrative Evidence to Win Sanctions Motions for Discovery Violations," paper accompanying presentation on "Aggressive Use of Sanctions to Penalize Discovery Violations" given by Paul Stritmatter at WSTLA "Hot Topics in Torts" CLE Seminar (Seattle, Oct. 4, 2006) (on file, King County Law Library). Chief Justice Andersen almost certainly had this development in mind when he cautioned in his opinion for this Court in *Fisons* against the danger of sanctions litigation becoming "a 'cottage industry' for lawyers." *See* 122 Wn.2d at 356.

would be consistent with this Court's long-standing prohibition against common law punitive damages. *See, e.g., Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 56, 25 P. 1072 (1892). Allowing the imposition of a default judgment because of discovery wrongdoing, even though a fair trial could still be had on the issue of whether the defendant has in fact breached the duty that forms the predicate for the plaintiff's right to recover damages, converts what would otherwise be an award of compensatory damages into an award of purely punitive damages and effectively circumvents the prohibition against common law punitive damages.[14] There is no good reason to countenance such an erosion in our state's public policy against such awards.[15]

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[14] When the State has violated a defendant's constitutional right to discovery under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), a dismissal of the State's case is entered only when it appears that the prosecution has destroyed evidence whose material exculpatory value was facially evident at the time it was destroyed *and* the defendant is unable to obtain comparable evidence by other reasonably available means. *See State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1997). It would be incongruous for Magana to be relieved of the obligation to prove that Hyundai's product was unreasonably dangerous, and to receive millions of dollars in damages, without first having to prove he can no longer get a fair trial on his claims, when criminal defendants whose *personal liberty* is at stake must make such a showing in order to receive the comparable relief of a "default acquittal."

[15] Reinstating the default in this case would also raise serious concerns under federal due process limits placed on punitive damage awards. The United States Supreme Court requires that such awards be reasonably proportionate, taking into account the reprehensibility of the conduct at issue as well as the relationship of the amount of the punitive damage award to the compensatory damage award. *See, e.g., BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). While Hyundai was found to have given misleading answers to OSI-related discovery requests, Hyundai also fully complied with an order to produce all OSI material responsive to those requests and otherwise cooperated with Magana's discovery requests by producing thousands of pages of documents and dozens of product test reports; a default would nonetheless deprive Hyundai of its right to trial by jury on liability and require payment of penalties in excess of $10,000,000. This result, especially considering that Magana has not proven that he has been deprived of *his* right to a fair trial, is impermissibly

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B. To Fully Protect the Constitutional Interests At Issue, This Court Should Declare That Neither a Dismissal Nor a Default May Be Imposed as a Sanction for Discovery Violations Unless the Complaining Party Establishes "Constitutional Prejudice": That They Have Been Deprived of a Fair Trial on Their Claims or Defenses and No Lesser Sanction Can Cure This Prejudice. Here, Magana Failed to Establish Either That the Late Production of Discovery Deprived Him of a Fair Trial, Or That an Alternative Sanction Could Not Cure Any Prejudice Ultimately Shown to have Been Caused by the Lateness of That Production.

Although Washington appellate courts repeatedly speak of the need for a party to establish "prejudice" as a prerequisite for imposing a sanction that "affect[s] a party's ability to present its case" (*Mayer v. Sto Industries*, 156 Wn.2d at 689-90), this Court has never expressly defined the *kind* of prejudice required to justify imposing the ultimate sanction of a dismissal or a default. Hyundai submits that this Court, in drawing the needed distinction between prejudice generally and the kind of prejudice required to justify the ultimate sanction of dismissal or default, should take a page from First Amendment jurisprudence.

Since the constitutionalization of defamation law in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the phrase "constitutional malice" has come to embody the distinction between open-ended common law notions of "malice," and the more specific showing that must be made in order to recover damages for

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disproportionate under recent Supreme Court precedents. *See, e.g., State Farm Mutual Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (reversing punitive damage award where record did not sustain required degree of reprehensibility of conduct or reasonable relationship of amount of award to compensable loss).

defamation from someone who has uttered constitutionally protected speech.[16] Especially given the core constitutional interests at stake here (due process; the right to jury trial), Hyundai urges this Court to draw a similar distinction in the field of discovery sanctions law and declare that the ultimate sanction of dismissal or default may not be imposed unless the following two elements of "constitutional prejudice" have been established: (1) the discovery violation at issue has deprived the complaining party of a fair trial on their claims or defenses; and (2) this prejudice cannot be cured by an alternative sanction. Moreover, Hyundai urges this Court to hold that such prejudice must be established by clear, cogent and convincing evidence, *and* that appellate courts will be required to closely scrutinize the imposition of a dismissal or default sanction. When the right to a trial on the merits is to be taken away, and particularly when that trial is to be by jury, the burden of proof as well as the standard of appellate review should be commensurate to the task of safeguarding such rights.[17]

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[16] For examples of appellate courts applying the requirement of "constitutional malice," *see Hatfill v. New York Times Co.*, 532 F.3d 312, 325 (4th Cir. 2008), *Meloft v. New York Life Insurance Co.*, 240 F.3d 138, 147 (2d Cir. 2001), and *Newton v. National Broadcasting Co.*, 930 F.2d 662, 681 (9th Cir. 1990).

[17] For an example of a court requiring clear and convincing proof before the ultimate sanction may be imposed, and the due process rationale for imposing that higher burden, *see Shepherd v. American Broadcasting Companies*, 62 F.3d 1469, 1476-78 (D.C. Cir. 1995) (reversing default). For an example of a court subjecting the imposition of a default judgment to close scrutiny, specifically in order to prevent a wrongful deprivation of the right to jury trial, *see Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 503-504 (4th Cir. 1977) (reversing default). Hyundai notes that, in order to provide sufficient protection to the First Amendment interests at stake, "constitutional malice" must be proven by clear and convincing evidence, and appellate courts subject findings of such malice to independent scrutiny. *See, e.g., Harte-Hankes Communications, Inc. v.*

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The trial court's default judgment cannot withstand scrutiny under this test:

• No Loss of a Fair Trial. Magana failed to prove that delayed production of the OSI discovery material had actually deprived him of a fair trial on his claims.[18] All Magana established was that OSI discovery material had been produced too close to the January 2006 retrial date for the trial to be held on that date, *and* that the parties needed more time (a few months at most) to determine whether any of the OSIs were substantially similar to Magana's accident and therefore actually admissible, or whether actual admissibility could no longer be determined because of the delay in production.[19] Moreover, the evidence before the trial court indicated that few if any of the OSIs would likely prove admissible, *see* CP 5577-78 (Blaisdell Decl. at pp. 6-7, ¶¶ 17-19) (discussing Accent OSIs), *and* that the ability to determine substantial

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Connaughton, 491 U.S. 657, 659, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). Hyundai also notes that Washington due process cases recognize the need for proof beyond a mere preponderance of the evidence. *See, e.g., Nguyen v. Dept. of Health*, 144 Wn.2d 516, 522-25, 29 P.3d 689 (2001) (clear and convincing proof required by due process in order to impose the "ultimate sanction" of revoking a physician's license to practice).

[18] Because this case involves the production of discovery sought by the complaining party, the trial court's default cannot be sustained by applying the *Hammond Packing* presumption. Nor can the trial court's default be salvaged by the court's non-OSI discovery violation findings, since neither singly nor in combination do any of these matters even begin to raise a legitimate concern about Magana's ability to have a fair trial on his claims. *See* Hyundai's Opening Brief to the Court of Appeals at pp. 64-70 (discussing the various non-OSI violation findings).

[19] In very similar circumstances, the D.C. Circuit vacated a default judgment imposed for failing to preserve personnel documents as required by federal regulations, because the trial court had failed to adequately consider whether a continuance would allow for reconstruction of the missing information. *See Webb v. District of Columbia*, 146 F.3d 964, 974 (1998).

similarity likely would not be materially compromised by the passage of time. *See* CP 5576-77 (Blaisdell Decl. at pp. 5-6, ¶¶ 12-16 (discussing Holcomb OSI)). Finally, and as the Court of Appeals expressly recognized, OSI evidence could not be dispositive of the case because Hyundai would remain free to argue that accidents of the sort described in the OSI reports would end up producing far more severe injuries, if seatbacks were made as rigid and unyielding as Magana was urging they should be. *See Magana II*, 141 Wn. App. at 518, n.20 ("any similar incidents of seat failure would not rebut Hyundai's expert testimony that an alternative design would be less safe" (citation omitted)).[20]

• Effectiveness of Alternate Sanctions. If on remand the process of investigation does uncover a problem with "stale" OSIs, the resulting prejudice can be completely cured by admitting the affected OSIs and prohibiting Hyundai from challenging their substantial similarity.[21]

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[20] Because this case does not involve the withholding of evidence that on its face would support a verdict in favor of Magana on his defective design claim, it cannot fairly be equated to cases such as *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002), where the defendant hid the existence of testing establishing a product defect and actually destroyed some of the testing materials. *See* 113 Wn. App. at 325-26; CP 2586-7, 2590-91 & 2593-94 (transcript of oral ruling of Judge Foscue in *Behr*); *see also Fisons*, 122 Wn.2d at 336 (defendant falsely denied the existence of "determinative 'smoking gun'" evidence). This case involves raw OSI discovery, which numerous courts have insisted must be closely scrutinized to assure *actual* relevance and admissibility. *See, e.g., Peters v. General Motors Corp.*, 200 S.W.3d 1, 9-12 (Mo. App. 2006) (reversing and remanding for new trial because OSI evidence did not satisfy substantial similarity requirement); *General Motors Corp. v. Lupica*, 237 Va. 516, 379 S.E.2d 311, 315-16 (1989) (same) (trial courts must "strictly scrutinize" proposed OSI evidence to assure substantial similarity)

[21] This alternative was suggested to the trial court, during the course of the evidentiary hearing closing argument in which Hyundai also criticized as "tantamount to a default" Magana's proposed alternate sanction under which *all* of the OSIs would have been admitted and Hyundai would have been denied the right to challenge *any* of them for lack

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Accordingly, there is no good reason for the trial court to revisit the question of whether Hyundai should be denied its day in court on the central issue of whether the design of the seatback of the 1996 Hyundai Accent was unreasonably dangerous, and (if it was) whether such a defect was the proximate cause of Jesse Magana's injuries.

Magana, of course, has resisted any measure of prejudice that would require he prove that he had, in fact, been deprived of a fair trial. Magana prefers to leave trial courts free to order defaults based on such non-merits factors as delay.[22] The resulting multi-factor balancing approach would not adequately protect either due process or the right to jury trial, because it would reduce the decision on whether to impose the ultimate sanction of default (or dismissal) to little more than an exercise in "good judgment" by trial judges about the equities of the case at hand, and

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of substantial similarity. *See* VRP (Jan. 19, 2006) 87-94 (discussing alternate sanctions); Ex. 48 (setting forth Magana's alternative to a default).

[22] Magana's emphasis on delay is more than a little ironic. First, Magana's lawyers did not commence his case until just before the running of the three-year statute of limitations. Second, Magana's lawyers induced clear and prejudicial error by the trial court at the Summer 2002 trial, when they persuaded the court not to tell the jury that the improper alternate design testimony of Dr. Burton had been stricken. Had that not been done, this case likely would have ended in the Spring of *2004* with an affirmance by the Court of Appeals (regardless of whether it was Hyundai or Magana appealing from the judgment on the jury's verdict). Third, faced with the production in December 2005 of the seatback OSIs pursuant to the trial court's discovery order, Magana's lawyers, instead of asking the court to postpone the retrial for the few months required to sort out the OSIs (and reserving the possibility of coming back to ask for sanctions if the record justified such a request), seized on their successful default effort in *Smith v. Behr Process* and chose to push for a default -- even though their own experts testified that it *was not possible* to say whether Magana's right to a fair trial had actually been compromised. As a result, instead of completing the investigation of the OSIs and conducting a retrial on liability by the Summer of *2006*, a second appeal by Hyundai to the Court of Appeals has resulted in a second reversal, that reversal is now under review by this Court, and a decision by this Court is unlikely to issue any time before mid-2009.

to which appellate courts would be compelled to defer in virtually every case. This Court should instead insist that the ultimate sanction of dismissal or default may not be imposed unless the complaining party proves that the discovery violation at issue has deprived them of a fair trial on their claims or defenses, and *also* proves that nothing short of the ultimate sanction can redress that prejudice. Magana failed to prove either,[23] and therefore was not entitled to a default judgment.

IV. CONCLUSION

This Court should affirm the reversal of the trial court's default judgment and remand with directions that any further sanctions that may be imposed shall not extend to the imposition of a default.

RESPECTFULLY SUBMITTED this 7th day of November, 2008.

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[23] Magana failed to meet his burden applying either a "preponderance" or a "clear, cogent and convincing" standard.